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No. 78-742

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JACK W. GRIGSBY, PETITIONER

*v.*

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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*Washington, D.C. 20530*

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### OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-21 to A-42), and the opinion on rehearing (Pet. App. A-3 to A-19) are reported at 585 F.2d 1069. The opinion of the district court (Pet. App. A-50 to A-66) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A-1 to A-2) was entered on October 5, 1978. The

petition for a writ of certiorari was filed on November 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 754(a)(1).

## QUESTION PRESENTED

Whether, in this action seeking review of an order of the Federal Energy Administration, the judgment of the court of appeals, remanding the case to the district court for further findings of fact, was based on grounds not relied on by the agency.

## STATEMENT

Acting under authority granted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, the Federal Energy Administration (FEA)[1] has established ceiling prices for "old oil" and higher prices for "new oil" (see Pet. App. A-9 to A-10). As the court of appeals summarized FEA's regulations (Pet. App. A-10 n.j), "new oil" is "generally the number of barrels of oil produced in a month minus the number of barrels produced on that same 'property' during the same month in 1972." The regulations generally define "property" as "the right which arises from a lease or from a fee interest to produce domestic crude oil." 10 C.F.R. 212.72.

[1] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, and Executive Order 12009, 42 Fed. Reg. 46267 (1977), the Department of Energy has succeeded to the functions of the FEA, which has been abolished as a separate agency.



In the interest of conservation, many states, including Louisiana, have laws providing for the "unitization" of oil producing properties. Under Louisiana law, the Commissioner of Conservation may approve agreements entered into by several leaseholders that establish a production "unit," which constitutes the "maximum area which may be efficiently and economically drained by one well." La. Rev. Stat. Ann. 30:9(B) (1975) (Pet. App. A-5 n.a). When the Commissioner approves a unit, only one well may be drilled on it, and the production is pooled among all the leasehold owners.

In 1969 the Commissioner designated a unit known as Heywood RA SU B and designated the Lucky Strike Well No. 1, operated by petitioner, as the unit well (Pet. App. A-5). In 1974 petitioner applied to the Commissioner for, and obtained, permission to drill a "substitute unit well" (known as the Robert Leger Well No. 1) on the unit, but on a different leasehold. The Leger Well began production in October 1974 and the Lucky Strike Well terminated production. Petitioner has charged "new oil" prices for all of the oil produced from the Leger Well.

In 1976 petitioner asked the Commissioner to recognize that two separate reservoirs of oil existed under the surface periphery of the Heywood RA SU B unit, at different depths, and to establish separate units for each reservoir. On June 24, 1976, the Commissioner acknowledged the existence of two reservoirs—the Heywood Sand, Reservoir A (from which the Lucky Strike Well had produced) and the Upper

Heywood "A" Sand, Reservoir A (from which the Ledger Well was producing). The Commissioner designated two units for the Upper Heywood "A" Sand, Reservoir A, and designated the Leger Well as the unit well for one of them (Pet. App. A-6 to A-7).[2]

In November 1976 FEA issued a remedial order to petitioner, asserting that he had been wrongfully charging "new oil" prices for oil produced from the Leger Well (Pet. App. A-7). The agency ultimately determined that the oil produced from the Leger Well from October 1974 (when it commenced) to September 1976 (when the agency amended its definition of "property") was "old oil," and that oil produced from the well after September 1976 was "new oil" (Pet. App. A-79). The agency ordered refunds with respect to sales of the "old oil" at "new oil" prices.

On review, the district court affirmed FEA's order (Pet. App. A-50 to A-66). After rehearing, the court of appeals reversed and remanded for further factual determinations by the district court (Pet. App. A-3 to A-19).[3] The court first rejected petitioner's argument that the Leger Well never produced oil from the same "property" from which the Lucky Strike Well

[2] The Commissioner also designated the Leger Well as the unit well for the unit covering the other reservoir (the Heywood Sand, Reservoir A), although that reservoir apparently was not productive (see Pet. 4). As the court of appeals noted (Pet. App. A-7 n.d), it is not clear why the Leger Well was the designated well for two units.

[3] The court of appeals affirmed the district court's judgment insofar as it related to a separate property (Pet. App. A-19), and petitioner does not seek review of that part of the judgment (Pet. 6 n.2).



had produced simply because the two wells were on different leaseholds. Instead the court accepted the agency's interpretation of "property"—articulated in its order in this case (see Pet. App. A-73 to A-79) —as focusing on "the 'right to produce,' not the fee or leasehold nature of the ownership interest." (Pet. App. A-11). And the right to produce, the court reasoned, depends on, among other things, state laws designating units that may comprise several leaseholds (Pet. App. A-11 to A-12). The court of appeals held, however, that when in June 1976 the Commissioner of Conservation acknowledged the existence of two reservoirs, and created new units with respect to each, that action "gave rise to a new 'right to produce' and, thus, to a new 'property' " (Pet. App. A-16) under FEA regulations and rulings. It therefore held that oil produced from the Leger Well after June 1976 was "new oil" (*ibid.*).

The court also concluded that the official status of the Leger Well between October 1974 and June 1976 was not clear from the record, and it remanded to the district court for further findings on that question (Pet. App. A-16 to A-19).

## ARGUMENT

Petitioner objects to the remand to the district court and contends that the court of appeals based its decision to remand on grounds not relied on by the agency. Petitioner's arguments are incorrect, and they do not state any novel or important legal issue.

1. The judgment below is interlocutory. The district court may conclude that, under Louisiana law and FEA regulations, the Leger Well always was producing from a new "property" and thus rule in favor of petitioner, thereby obviating any occasion for this Court's review. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

2. In any event, petitioner is incorrect in contending (Pet. 6) that the remand order was based on grounds not relied on by FEA. The court agreed with and affirmed the agency's statement of the principles to be applied in determining what is the "producing property" under the FEA regulations, and it simply remanded for a determination of the facts to which those principles are to be applied. Thus the agency held (Pet. App. A-73 to A-79), and the court agreed (Pet. App. A-11 to A-16), that whether, from October 1974 to June 1976, the Leger Well produced oil from the same "property" from which the Lucky Strike Well had produced oil depends on whether petitioner's right to produce from the Lucky Strike Well established the same right to produce from the Leger Well (or whether, on the other hand, production from the Leger Well was based on a new and different right to produce). The court held that the answer to that question depends on the official status of the Leger Well during the relevant period. The court noted that that status was unclear from the record and that it would be relevant to the inquiry on remand to ascertain, *inter alia*, whether or not petitioner apportioned the production from the Leger Well among the lessees who shared an interest in the original unit (Pet. App. A-16 to A-18). That ruling is correct and is consistent with the agency's articulated view.[4]



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

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[4] As the FEA's Office of Exceptions and Appeals explained (Pet. App. A-75 to A-79), the mere fact that a second well, drilled on the premises from which an "old oil" well is already producing, taps a different reservoir does not necessarily mean that the second well is producing from a different property if the "separate reservoirs are subject to the same right to produce * * *" (Pet. App. A-76)—*e.g.*, a right based on a fee interest. Although the mere fact that a second well taps a new reservoir does not necessarily mean that it produces from a new property, FEA amended its definition of property on September 1, 1976, to permit producers to treat wells producing from different reservoirs as producing from different properties, so long as state authorities officially recognize the separate reservoirs (Pet. App. A-77). The amended definition of property applies only prospectively. Even if the amended definition were applied retroactively, it would not assist petitioner since there was no official recognition of separate reservoirs during the period in question. The amendment, however, does eliminate any prospective significance to the issue presented by petitioner and is thus a further reason why this Court's review is unwarranted.

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